

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUSAN MAE POLK,  
Plaintiff,  
v.  
DEPUTY JAMES CAVIN, et al.,  
Defendants.

) No. C 08-1483 MMC (PR)  
)

) **ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL DISCOVERY  
FROM CONTRA COSTA COUNTY  
SUPERIOR COURT; GRANTING  
DEFENDANTS ROBERTS AND  
GIBSON'S MOTION TO DISMISS;  
DISMISSING UNSERVED  
DEFENDANT PATRICK;  
DIRECTIONS TO CLERK**  
)

) (Docket Nos. 99, 138)  
)

On March 17, 2008, plaintiff, a California prisoner then incarcerated at the Central California Women’s Facility in Chowchilla, California (“CCWF”), and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983.<sup>1</sup> Thereafter, by order filed April 30, 2009, the Court found the allegations in plaintiff’s third amended complaint (“TAC”) when liberally construed, stated claims for excessive force and supervisorial liability against Contra Costa County Sheriff’s Deputy James Cavin, Deputy Lt. Matt Chertkow, and Sheriff Warden Rupf (collectively “County defendants”). The Court also found the TAC stated a claim for denial of access to courts against CCWF prison officials Deborah Patrick, Sergeant Roberts, and Sergeant Gibson (collectively “CCWF defendants”).

<sup>1</sup> Plaintiff currently is incarcerated at Valley State Prison for Women (“VSPW”).

1 Now pending before the Court are: (1) plaintiff's motion to compel discovery from the  
2 Contra Costa County Superior Court; and (2) defendants Roberts and Gibson's motion to  
3 dismiss, or alternatively, to sever the complaint.<sup>2</sup>

#### 4 FACTUAL AND PROCEDURAL BACKGROUND

5 In the TAC, plaintiff alleges the following:

6 In 2002 and 2003, in Contra Costa County Superior Court, plaintiff faced criminal  
7 proceedings for the murder of her husband. (TAC at 3: ¶¶1-3.) On August 29, 2003, when  
8 plaintiff was on her way to court to submit a "Faretta" motion, Deputy Cavin asked plaintiff  
9 if she was going to represent herself and told her she "better not talk in court." (TAC at  
10 12: ¶6-13:¶7.) When, prior to presenting her motion, plaintiff was conferring through a  
11 plexi-glass window with two representatives from the Public Defender's office, Cavin  
12 interrupted, shouting "I told you not to talk in court," and then hit plaintiff twice on her left  
13 shoulder and chest. (TAC at 15: ¶¶12-13.) Lt. Chertkow was watching through the plexi-  
14 glass but did nothing to intervene. (TAC at 15: ¶16.)

15 Cavin then removed plaintiff from the courtroom into the holding area and hit plaintiff  
16 on her elbow with a "blackjack," causing her to collapse on the floor in excruciating pain.  
17 (TAC at 16: ¶¶18-20.) Plaintiff cried out to a female deputy that her elbow was broken.  
18 (TAC at 16: ¶21.) Before plaintiff was taken to the hospital, Lt. Chertkow was extremely  
19 hostile toward her, refused to allow her to file a complaint against Deputy Cavin, and  
20 threatened to charge her with battery against a police officer. (TAC at 18: ¶31.) Later that  
21 afternoon, plaintiff was taken to a local hospital where an X-ray confirmed her elbow was  
22 broken. (TAC at 18: ¶¶32-33.) Plaintiff further alleges that County Sheriff Rupf  
23 implemented a policy of "placing the most aggressive and violent officers in charge of the  
24 most vulnerable inmates." (TAC at 32: ¶34.)

25 In February 2007, plaintiff was transferred to VSPW (TAC at 38: ¶14), and in June

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28 <sup>2</sup> Also pending is County defendants' motion for summary judgment, which motion  
will be addressed in a separate order.

1       2007 she was transferred to administrative segregation at CCWF (TAC at 40: ¶18). In  
2 August 2007, plaintiff filed emergency administrative appeals, complaining that CCWF  
3 defendants Sgt. Gibson and Sgt. Robertson were denying her access to the law library and to  
4 legal materials adequate to enable her to file a complaint concerning the above-noted assault  
5 and to comply with other court deadlines. (TAC 44: ¶¶5-6.) Plaintiff further alleges that  
6 CCWF's acting warden at the time, Deborah Patrick ("Patrick"), implemented "a policy . . .  
7 depriving inmates in Ad Seg of their legal materials and legal supplies [and] access to a law  
8 library." (TAC 43: ¶3.)

9              Based on the above allegations, the Court found plaintiff stated cognizable claims for  
10 excessive force and supervisorial liability against County defendants and a claim for denial  
11 of access to the courts against CCWF defendants.

12              Thereafter, County defendants moved to dismiss the claims against them on the  
13 ground that such claims were barred by the statute of limitations. By order entered March  
14 18, 2010, the Court granted the motion to dismiss plaintiff's claims against County  
15 defendants as time-barred. (Docket No. 73.) By separate order entered the same date, the  
16 Court also granted a separate motion to dismiss filed by CCWF defendants, on the ground  
17 that plaintiff had failed to exhaust her administrative remedies as to her claims against them.  
18 (Docket No. 74.) On August 17, 2011, the Ninth Circuit issued an opinion reversing the  
19 dismissals and remanding for further proceedings. (Docket No. 83.) Thereafter, on  
20 September 23, 2011, the Court reopened the case and directed defendants to file a motion for  
21 summary judgment or other dispositive motion with respect to the claims found to be  
22 cognizable in the TAC. (Docket No. 89.)

## DISCUSSION

24       A. Plaintiff's Motion to Compel

25              On March 16, 2012, plaintiff filed a motion to compel discovery from the Contra  
26 Costa County Superior Court ("Superior Court"). (Docket No. 138.) Therein, plaintiff stated  
27 that, on January 29, 2012, she served a subpoena duces tecum seeking records from the  
28 Superior Court and had not yet received a response. On March 23, 2012, County defendants

1 filed a response stating they had no involvement with the subpoena but believed the Superior  
2 Court had not been served with either the subpoena or the motion to compel. (Docket No.  
3 143.) On April 5, 2012, plaintiff responded by admitting she had failed to serve the Superior  
4 Court. (Docket No. 150.) Plaintiff also stated she had since served the Superior Court with  
5 the motion to compel, but she did not state whether she had served the Superior Court with  
6 the subpoena itself. (*Id.*)

7 There is no indication that plaintiff has served the Superior Court with the subpoena  
8 duces tecum. Further, plaintiff fails to certify that she has fulfilled the meet and confer  
9 requirement under Federal Rule of Civil Procedure 37(a)(1) and Northern District of  
10 California Civil Local Rule 37-1(a).

11 Accordingly, plaintiff's motion to compel will be denied.

12 **B. Defendants Roberts and Gibson's Motion to Dismiss**

13 Defendants Roberts and Gibson move, pursuant to Rule 12(b)(6) of the Federal Rules  
14 of Civil Procedure, to dismiss plaintiff's claim against them for denial of access to courts.<sup>3</sup>  
15 For the reasons discussed below, the Court will grant the motion to dismiss.

16 1. Standard of Review

17 Rule 12(b)(6) provides for dismissal of any cause of action that "fail[s] to state a claim  
18 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by  
19 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's  
20 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels  
21 and conclusions, and a formulaic recitation of the elements of a cause of action will not  
22 do. . . . Factual allegations must be enough to raise a right to relief above the speculative  
23 level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (citations omitted)  
24 (brackets in original). A motion to dismiss should be granted where the complaint does not  
25 proffer "enough facts to state a claim for relief that is plausible on its face." Id. at 570.

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27 <sup>3</sup> As noted, plaintiff has also named former CCWF Warden Patrick as a defendant to  
28 said claim. Patrick, however, has not been served; consequently, no appearance has been  
made on her behalf.

1       The court must accept as true all material allegations in the complaint, but it need not  
2 accept as true “legal conclusions cast in the form of factual allegations if those conclusions  
3 cannot be reasonably drawn from the facts alleged.” Clegg v. Cult Awareness Network, 18  
4 F.3d 752, 754-55 (9th Cir. 1994). Review is limited to the contents of the complaint,  
5 including documents physically attached to the complaint or documents on which the  
6 complaint necessarily relies and whose authenticity is not contested. Lee v. County of Los  
7 Angeles, 250 F.3d 668, 688 (9th Cir. 2001). The court may also take judicial notice of facts  
8 that are not subject to reasonable dispute. Id.

9       A denial of access claim is cognizable under 42 U.S.C. § 1983. To state a claim under  
10 42 U.S.C. § 1983, a plaintiff must allege facts sufficient to show (1) a person acting “under  
11 color of state law” committed the conduct at issue, and (2) the conduct deprived the plaintiff  
12 of some right, privilege, or immunity protected by the Constitution or laws of the United  
13 States. 42 U.S.C. § 1983; Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th Cir. 1986).

14       2.     Analysis

15       Plaintiff alleges that CCWF defendants prevented her from timely bringing suit against  
16 County defendants for the claims asserted against County defendants in the TAC.

17       “Under the First and Fourteenth Amendments to the Constitution, state prisoners have  
18 a right of access to the courts.” Phillips v. Hust, 477 F.3d 1070, 1075 (9th Cir. 2007) (citing  
19 Lewis v. Casey, 518 U.S. 343, 346 (1996)), vacated on other grounds by Hust v. Phillips, 129  
20 S.Ct. 1036 (2009)). The right of access requires prison officials to provide inmates the  
21 opportunity to “prepare, serve, and file” court documents in cases affecting their liberty. Id. at  
22 1075-76 (internal quotation and citation omitted). Prisoners do not, however, have a  
23 constitutional right to a law library. Lewis, 518 U.S. at 350-51. Law libraries are only one  
24 means of assuring prisoners meaningful access to the courts. Id.

25       There are two types of access to courts claims: forward-looking and backward-looking.  
26 See Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). A forward-looking claim arises  
27 where “systemic official action frustrates a plaintiff or plaintiff class in preparing or filing  
28 suits at the present time”; the purpose of a forward-looking claim is to remove the frustrating

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1 condition such that a lawsuit may be filed in the future. Id. at 413. A backward-looking claim  
2 concerns the lost opportunity to litigate a specific case, “no matter what official action [is  
3 taken] in the future.” Id. at 413-14. Plaintiff’s cause of action is a backward-looking claim.  
4 She argues that CCWF defendants’ actions and policies denied her adequate time in the law  
5 library and adequate access to legal materials, rendering her unable to meet the statute of  
6 limitations for filing the instant lawsuit against County defendants.

7 To adequately plead a backward-looking denial of access claim, plaintiff must allege  
8 three elements: “1) the loss of a ‘nonfrivolous’ or ‘arguable’ underlying claim; 2) the official  
9 acts frustrating the litigation; and 3) a remedy that may be awarded as recompense but that is  
10 not otherwise available in a future suit.” Phillips, 477 F.3d at 1076 (citing Christopher, 536  
11 U.S. at 413-14). The first element requires plaintiff to show she suffered an “actual injury” by  
12 being “shut out of court.” Christopher, 536 U.S. at 415; Lewis, 518 U.S. at 351; Phillips, 477  
13 F.3d at 1076. The second element requires plaintiff to show that a defendant “proximately  
14 caused” the alleged violation of plaintiff’s rights. Phillips, 477 F.3d at 1077. The third  
15 element requires plaintiff to show she has “no other remedy than the relief available in [the]  
16 denial of access suit.” Id. at 1078-79.

17 Plaintiff’s allegations fail at the first step. Plaintiff successfully filed this action against  
18 County defendants, and she is still pursuing her claims against them. Although this Court  
19 originally dismissed plaintiff’s claims against County defendants as time-barred, the Ninth  
20 Circuit, as noted above, reversed and remanded for further proceedings on those claims.  
21 Because plaintiff’s lawsuit against County defendants remains pending, she has sustained no  
22 “actual injury” as a result of being “shut out of court.” See Christopher, 536 U.S. at 415;  
23 Lewis, 518 U.S. at 351. For the same reasons, plaintiff cannot show CCWF defendants  
24 proximately caused any such injury, the second element of a denial of access claim. See  
25 Phillips, 477 F.3d at 1077. Lastly, plaintiff fails to show she has no remedy other than the  
26 relief available on her denial of access claim, the third element. See Phillips, 477 F.3d at  
27 1078-79.

28 Although, at a later stage of the proceedings, plaintiff’s claims against County

1 defendants may be found time-barred, at this stage of the proceedings, her denial of access  
2 claim is premature. Premature claims for denial of access to the courts are subject to  
3 dismissal without prejudice. Delayed v. Wagner, 143 F.3d 1219, 1222-23 (9th Cir. 1998);  
4 see, e.g., Kari-Panahi v. Los Angeles Police Dep't., 839 F.2d 621, 625 (9th Cir.1988)  
5 (ordering dismissal without prejudice where plaintiff's allegations would be mooted if he  
6 were to succeed on claims that remained pending).

7 Accordingly, plaintiff's claims against defendants Roberts and Gibson will be  
8 dismissed without prejudice.<sup>4</sup>

9 C. Unserved Defendant

10 To date, Patrick has not been served. Two attempts to serve Patrick have been  
11 unsuccessful, and plaintiff has been unable to provide a current address for said defendant. It  
12 is clear, however, that the claims against Patrick are subject to dismissal for the reasons  
13 discussed above. Specifically, plaintiff alleges that Patrick oversaw the actions of CCWF  
14 defendants Roberts and Gibson, and there is no suggestion in the TAC and exhibits attached  
15 thereto, or in the briefs and exhibits filed in connection with the instant motion to dismiss, that  
16 the Court's analysis under Rule 12(b)(6) with respect to the claims against Patrick would  
17 differ in any respect from the analysis thereunder with respect to the claims against Roberts  
18 and Gibson. Given the Court's finding that plaintiff's denial of access claim against Roberts  
19 and Gibson is premature, plaintiff cannot prevail on that same claim as against Patrick.

20 Accordingly, the Court will dismiss plaintiff's denial of access claim against defendant  
21 Patrick. See Abagnin v. AMVAC Chemical Corp., 545 F.3d 733, 742 (9th Cir. 2008)  
22 (holding district court properly granted motion for judgment on pleadings as to unserved  
23 defendants where such defendants were in position legally indistinguishable from that of  
24 served defendants, against whom claim for relief could not be stated); Columbia Steel  
25 Fabricators, Inc. v. Ahlstrom Recovery, 44 F.3d 800, 803 (9th Cir. 1995) (affirming grant of

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27                  <sup>4</sup> In light of such finding, the Court does not reach defendants Roberts and Gibson's  
28 alternative argument that the claims against them should be severed under Rule 21 of the  
Federal Rules of Civil Procedure.

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1 summary judgment in favor of nonappearing defendant where plaintiff, in response to  
2 summary judgment motion filed by defendant who had appeared, had “full and fair  
3 opportunity to brief and present evidence” on dispositive issue equally applicable to claim  
4 against nonappearing defendant).

5 **CONCLUSION**

6 For the foregoing reasons, the Court orders as follows:

7 1. Plaintiff’s motion to compel discovery from the Contra Costa County Superior  
8 Court is hereby DENIED.

9 2. Plaintiff’s claim alleging denial of access to the courts is hereby DISMISSED  
10 WITHOUT PREJUDICE as to defendants Roberts, Gibson, and Patrick.

11 3. The Clerk is DIRECTED to terminate Roberts, Gibson, and Patrick as defendants  
12 on the court docket.

13 4. The Clerk is further DIRECTED to serve a copy of this order on: (1) Contra Costa  
14 County Superior Court, Court Records Clerk, 1111 Ward Street, Martinez, CA 94553; and  
15 (2) Office of County Counsel for Contra Costa County, 651 Pine Street, 9th Floor, Martinez,  
16 CA 94553.

17 This order terminates Docket Numbers 99 and 138.

18 **IT IS SO ORDERED.**

19 DATED: May 23, 2012

  
MAXINE M. CHESNEY  
United States District Judge

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